96-7901 (2)

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

Supreme Court, U.S.
FILED
JAN 27 1997
OFFICE OF THE CLERK

RICHARD F. TREST,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

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SUPREME COURT, U.S.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Trest
v.
Cain

QUESTION PRESENTED

1. WHETHER, DESPITE THE STATE'S FAILURE TO RAISE THE AFFIRMATIVE DEFENSE OF PROCEDURAL DEFAULT AT ANY STAGE IN THE FEDERAL HABEAS CORPUS PROCEEDINGS, THE COURT OF APPEALS IS REQUIRED TO RAISE THE DEFENSE *SUA SPONTE* AND IS FORECLOSED FROM REVIEWING THE CLAIM ON THE MERITS BASED UPON ITS CONCLUSION THAT THE CLAIM IS PROCEDURALLY DEFAULTED?

2. WHETHER A FEDERAL COURT HAS JURISDICTION TO REVIEW A CLAIM RAISED IN A FEDERAL HABEAS CORPUS PROCEEDING BY A STATE PRISONER CHALLENGING THE CONSTITUTIONALITY OF HIS CURRENT STATE SENTENCE FOR WHICH HE IS IN CUSTODY ON THE BASIS THAT IT WAS UNCONSTITUTIONALLY ENHANCED BY AN EARLIER, SATISFIED STATE CONVICTION THAT THE PETITIONER CONTENDS IS CONSTITUTIONALLY INVALID AND SHOULD BE DEPRIVED OF ITS COLLATERAL CONSEQUENCE OF ENHANCING THE SUBSEQUENT SENTENCE?

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IN THE
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RICHARD F. TREST,
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On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Richard F. Trest, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, which, on direct appeal, affirmed the district court's denial of petitioner's petition for a writ of habeas corpus to review his Louisiana state sentence.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit sought to be reviewed, *Trest v. Whitley*, 94 F.3d 1005 (5th Cir. 1996), appears as Appendix A.

JURISDICTION

On September 17, 1996, the United States Court of Appeals for the Fifth Circuit rendered its decision on direct appeal of petitioner's conviction and sentence under jurisdictional authority of 28 U.S.C. § 1291. *Trest v. Whitley*, 94 F.3d 1005 (5th Cir. 1996). On October 29, 1996, the court of appeals denied petitioner's petition for rehearing and suggestion for rehearing en banc. *Trest v. Whitley*, 102 F.3d 552 (5th Cir. 1996). Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254(b) bars habeas corpus relief "unless it appears that the applicant has exhausted the remedies available in the courts of the State."

28 U.S.C. § 2241(c)(3) provides that a writ of habeas corpus shall not extend to a prisoner unless "[h]e is in custody in violation of the Constitution or laws or treaties of the United States; . . ."

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below

On September 30, 1991, petitioner Richard F. Trest, a Louisiana state prisoner in custody under a Louisiana enhanced sentence, appearing *pro se*, filed a petition pursuant to 28 U.S.C. Section 2254 for a writ of habeas corpus by a person in state custody. Record on Appeal (hereinafter "R.") at 1. Petitioner challenged the constitutionality of his current Louisiana sentence of 35 years

imprisonment imposed upon him as an habitual offender by the 26th Judicial District Court in Bossier Parish, Louisiana on June 8, 1979. *Id.* In his Memorandum of Law Supporting Application For Writ of Habeas Corpus, petitioner urged, *inter alia*, as grounds in support of the unconstitutionality of his current Louisiana sentence, that the state trial court erred in relying on a 1976 Mississippi conviction in sentencing him as an habitual offender, given that the Mississippi conviction itself was constitutionally invalid. R. at 7, 20 (Claim No. 7, Part B). In support of his writ, petitioner submitted a copy of the Habitual Offender Bill of Information filed against him in the 26th Judicial District Court and the transcript of the hearing on the habitual offender bill. R. at 41-56. Petitioner further alleged that he had filed for post-conviction relief in the 26th Judicial District Court, which was denied on March 26, 1990, and which denial was affirmed by the Louisiana Supreme Court on May 17, 1991. R. at 7. *See also State ex rel. Trest v. Smith*, 580 So.2d 374 (La. May 17, 1991), denying supervisory writs and writs of review from the 26th Judicial District Court in No. 56,595, and *State of Louisiana v. Trest*, No. 56,595 in the 26th Judicial District Court, pleading entitled "Reasons for Denial of Post-Conviction Relief," dated March 26, 1990, denying relief on the merits. Petitioner also alleged that he maintained the same grounds for relief in state post-conviction proceedings as in his federal habeas petition. R. at 3.

The State of Louisiana, in its Answer to Application for Writ of Habeas Corpus, did not specifically respond to the above ground for relief. R. at 65-78. However, the state did acknowledge that petitioner had exhausted his claims, stating: "From a review of the record, it does appear to the State of Louisiana that petitioner does not have any State remedies at this time, and therefore the State admits that petitioner has exhausted all State remedies, including any post conviction relief available to him under Louisiana law." R. at 65.

On February 2,1994, the magistrate judge issued a Report and Recommendation that the petition for writ of habeas corpus be denied. R. at 148, 156. The Report did not address the ground for relief set forth in Claim 7, Part B of petitioner's Memorandum of Law. However, the magistrate judge concluded with respect to the issue of exhaustion:

> Petitioner has exhausted his state court remedies by application for post-conviction relief/writ of habeas corpus in the 26th Judicial District Court, and to the Louisiana Supreme Court which both denied him relief.

R. at 148.

On February 18, 1994, petitioner, again proceeding *pro se*, filed his Objection to Magistrate's Report and Recommendation. R. at 175. In his objections, petitioner, while admitting that the claim was "unskilled and obscurely raised," R. at 176, pointed out that the Report failed to address the Claim 7, Part B issue of the unconstitutionality of his 1976 Mississippi conviction and its consequent unavailability for use in the enhancement of petitioner's sentence under the habitual offender provisions of La. R.S. 15:529.1. In his objections, petitioner further explained that the Mississippi conviction was constitutionally infirm based on the Mississippi trial court's failure properly to inform petitioner, prior to his guilty plea, of his constitutional rights and of the maximum sentence he could receive, in violation of *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709 (1969). R. at 177-181. Petitioner attached a copy of the transcript of his guilty plea in Mississippi state court held on May 24, 1976. R. at 182-222.

On May 13, 1994, the district court entered a judgment denying petitioner's application for a writ of habeas corpus. R. at 230. On May 26, 1994, petitioner filed his notice of appeal.

On May 15, 1995, the United States Court of Appeals for the Fifth Circuit appointed undersigned counsel to represent petitioner in the Court of Appeals and directed the filing of

supplemental briefs addressing the issue raised by *Custis v. United States*, __ U.S. __, 114 S.Ct. 1732 (1994), concerning collateral attacks on prior convictions used to enhance a subsequent conviction.

A majority of a panel[1] of the United States Court of Appeals for the Fifth Circuit, raising the defense of procedural default *sua sponte*,[2] affirmed the district court's denial of federal habeas corpus relief to petitioner without reaching the *Custis* issue. *Trest v. Whitley*, 94 F.3d 1005 (5th Cir. 1996), attached as Appendix A. The panel majority concluded that petitioner's claim challenging the constitutionality of the Louisiana enhanced sentence as improperly based on constitutionality invalid underlying prior Mississippi convictions, although exhausted and not procedurally defaulted in the Louisiana state courts, was nonetheless procedurally defaulted because of petitioner's failure to challenge the underlying prior Mississippi convictions in Mississippi state court in a timely fashion under Mississippi post-conviction procedure. *Id.* at 1008-1009. The court concluded that, under this Court's decision in *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S.Ct. 2546, 2565 (1991), a procedural default "will block all federal review of a claim that a conviction was unconstitutional" unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or can demonstrate that failure to consider the claim will result in a fundamental miscarriage of justice. 94 F.3d at 1009. After having raised the issue *sua sponte* and giving petitioner no opportunity to respond, the court then concludes:

---

[1]The Honorable Robert M. Parker dissented.

[2]The issue was not raised by the appellate court at any point prior to the issuance of the panel opinion, and, thus, parties were never given an opportunity to address the issue of procedural bar.

> In the instant case, Trest neither alleges such cause and prejudice nor a fundamental miscarriage of justice; indeed, Trest has not even attempted to bear this burden. Hence, a federal district court in Louisiana cannot consider Trest's claims that his Mississippi convictions were somehow unconstitutional."

Id.

The panel majority reached this result despite the circumstances that (1) the State of Louisiana never raised the defense of procedural default at any stage of the federal habeas or state post-conviction proceedings, and, in fact, admitted in the federal district court that petitioner had exhausted all federal habeas corpus claims in Louisiana state court; (2) petitioner did, in fact, timely file a Louisiana state post-conviction petition wherein he exhausted all claims, including his challenge to the constitutionality of the Louisiana enhanced sentence as a result of the unconstitutionality of the underlying Mississippi prior convictions, and was not procedurally defaulted by either the Louisiana district or supreme courts, but was denied relief on the merits; and (3) petitioner's federal habeas corpus petition seeks to have the Louisiana enhanced sentence voided and reduced based upon the unconstitutionality of the underlying prior Mississippi convictions, thus depriving the Mississippi convictions of the collateral consequence of enhancing the Louisiana sentence, without necessarily voiding the Mississippi convictions for all purposes, relief which petitioner contends is available under federal habeas corpus review.

In his dissent, the Honorable Robert M. Parker noted that the state, by failing to raise the procedural default as a defense, lost the right to assert that defense. *Id.* The dissent reasoned further:

> In this case, the Louisiana court did not explicitly rely on the Mississippi statute of limitations, nor did the petitioner have the opportunity to rebut any resulting presumption. The majority's observation that Trest did not even attempt to bear his burden of establishing cause and prejudice is central to the flaw in their reasoning. How can this Court penalize Trest for failing to respond to the state's affirmative defense of procedural bar, when the State declined to raise such a defense?

Id.

B. Statement of Facts

In proceedings held in the 26th Judicial District Court for the State of Louisiana on June 8, 1979, petitioner, who had been convicted of armed robbery after a trial by jury, was sentenced to a term of imprisonment of 35 years without benefit of parole, probation or suspension of sentence. R. at 55. In making its sentencing determination, the state district court found that petitioner was a multiple offender as defined by the Louisiana Habitual Offender Law, La. R.S. 15:529.1, based on petitioner's convictions in Mississippi state court in 1976, pursuant to pleas of guilty, which the Louisiana state district court treated as one conviction for purposes of the Habitual Offender Law. R. at 53, 55. *See also* Habitual Offender Bill of Information, R. at 25. Because petitioner was found to be a multiple offender, the state district court concluded that the minimum sentence that it could impose under the Louisiana Habitual Offender Law was one-third of the maximum petitioner could have received as a first offender, or 33 years. R. at 55. *See also* La. R.S. 15:529.1. At the multiple offender proceeding, the petitioner did not object to the Louisiana state district court's reliance on the Mississippi convictions on the basis that they were constitutionally infirm.

The Mississippi state court convictions that formed the basis for the enhancement of petitioner's current Louisiana sentence arose as the result of petitioner's pleas of guilty to five counts of burglary on May 24, 1976, when petitioner was 18 years old. R. at 159, 171, 172. Petitioner was sentenced to serve concurrent four year terms of imprisonment on the five counts and was released from prison in Mississippi in 1978. R. at 125.

In the course of the guilty plea colloquy forming the basis for the Mississippi convictions, petitioner was questioned by the Mississippi state district court judge, along with co-defendants St.

Clair Locke and Tommy Bryant, concerning his waiver of rights. As evidenced by the transcript of that proceeding, the state court judge stated as follows:

> BY THE COURT: All right, boys, do you understand, each of you now, that you are entitled to a jury trial, if you want it, to each of these charges? Do you understand that?
>
> BY THE DEFENDANTS: Yes, sir.
>
> BY THE COURT: These are rights which you have. They are valuable rights. You have a right to a trial by jury and let the jury determine whether or not you are guilty of these charges. Also, you have a right to cause the State to bring witnesses here and testify in open court. That's called the right of confrontation. You have the right to cross-examine these witnesses, you and your attorneys, and you don't have to take the stand. You can, you know, remain silent. And these are valuable rights which you have but which will go by the board, so to speak. They will be waived, if you plead guilty. Do you understand that, Bryant?
>
> BY DEFENDANT BRYANT: Yes, sir.
>
> BY THE COURT: Locke?
>
> BY DEFENDANT LOCKE: Yes, sir.
>
> BY THE COURT: St. Clair?[3]
>
> BY DEFENDANT ST. CLAIR: Yes, sir.

R. at 162. The transcript does not reflect that petitioner responded that he understood each of the constitutional rights waived as the result of a guilty plea, or even that he heard the state judge's statement of those rights as set forth above. Nor does the record reflect that petitioner was informed

[3]According to the transcript of the proceedings, St. Clair is actually the first name of defendant Locke.

of the maximum sentence he could receive as a result of his guilty pleas or of his right to appeal. R. at 164, 165, 170, 171.

REASON FOR GRANTING THE WRIT

I. GIVEN THE STATE'S WAIVER OF THE AFFIRMATIVE DEFENSE OF PROCEDURAL DEFAULT BY FAILING TO RAISE IT AT ANY TIME DURING THE FEDERAL HABEAS CORPUS PROCEEDINGS BELOW, THE COURT OF APPEALS WAS NOT FORECLOSED FROM REVIEWING THE FEDERAL HABEAS PETITIONER'S CLAIM ON THE MERITS DESPITE ITS CONCLUSION THAT THE CLAIM WAS PROCEDURALLY DEFAULTED

At no point in the federal habeas corpus proceedings (or in the state post-conviction proceedings) did the State of Louisiana raise as an affirmative defense to petitioner's attack on the constitutionality of his enhanced Louisiana sentence based on the unconstitutionality of the underlying Mississippi prior convictions that the claim, although exhausted in Louisiana state courts, is procedurally barred in federal habeas corpus because of petitioner's failure to file timely in Mississippi state court for post-conviction review of those Mississippi convictions. Nevertheless, the Fifth Circuit concluded that it was foreclosed from reviewing the merits of petitioner's claim because it viewed the claim as procedurally defaulted and because petitioner (despite the circumstance that he was never given an opportunity) never demonstrated cause and prejudice for the alleged default or a fundamental miscarriage of justice. The appellate court's conclusion in this regard is in conflict with the jurisprudence of other circuits as well as the jurisprudence of this Court.

In *Gray v. Netherland*, ___ U.S. ___, 116 S.Ct. 2074, 2080 (1996), this Court explained that 28 U.S.C. § 2254(b) bars the granting of habeas corpus relief "unless it appears that the applicant has exhausted the remedies available in the courts of the State." Further, if it is clear that at the time of the federal petition that the habeas petitioner's claims are procedurally barred under state law, the

exhaustion requirement is satisfied *Id.* However, "the procedural bar which gives rise to exhaustion provides an independent and adequate state-law ground for the conviction and sentence, and thus prevents federal habeas corpus review of the defaulted claim, unless the petitioner can demonstrate cause and prejudice for the default." *Id.* Nevertheless, as the Court further explained, "procedural default is an affirmative defense" and the state "would have been obligated to raise procedural default as a defense, or lose the right to assert the defense thereafter." *Id.* at 2082.

In the context of the defense of failure to exhaust state remedies, this Court has concluded that the failure does not deprive an appellate court of jurisdiction to consider the merits of a habeas corpus application. *Granberry v. Greer*, 481 U.S. 129, 107 S.Ct. 1671, 1673-74 (1987). As the court explained:

> As the Strickland [*Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984) case demonstrates, there are some cases in which it is appropriate for an appellate court to address the merits of a habeas corpus petition notwithstanding the lack of complete exhaustion. Although there is a strong presumption in favor of requiring the prisoner to pursue his available state remedies, his failure to do so is not an absolute bar to appellate considerations of his claims.

Id. at 132, 1674. Moreover, where the states raises for the first time on appeal the defense of nonexhaustion, this Court concluded that the appellate court is not required to dismiss for nonexhaustion. *Id.* 133, 1674. Rather, the appellate court should determine whether the interests of comity and federalism will be better served by addressing the merits forthwith or by requiring a series of additional state and district court proceedings before reviewing the merits of the petitioner's claim. *Id.* at 134, 1675.

Other circuits to address the issue of the state's failure to raise the affirmative defense of procedural default have concluded that the state waived the defense and have decided the merits of

the claim. For example, in *Esslinger v. Davis*, 44 F.3d 1515, 1525-28 (11th Cir. 1995), the Eleventh Circuit concluded that the state explicitly waived procedural default defense by asserting in supplemental answer that the petitioner exhausted state remedies and committed no procedural defaults. Under the circumstances, the court of appeals concluded that the district court's *sua sponte* invocation of the procedural default to bar relief, despite the State's waiver, served no important federal interest. *Id.* at 1527 and 1528 n. 45. Finally, the court concluded that it is "fundamentally unfair for a court *sua sponte* to invoke a procedural default without giving the petitioner an opportunity to show cause for the default." *See, e.g., Shaw v. Norris*, 33 F.3d 958, 960 n.3 (8th Cir. 1994) (state's failure to assert procedural default defense in district court constitutes waiver of defense); *Wells v. Maass*, 28 F.3d 1005, 1010 (9th Cir. 1994) (state's failure to assert that either aspect of petitioner's ineffectiveness claim was not raised in state trial court constitutes a waiver of any claim of procedural default that might have arisen from any possible variance between the ineffectiveness claim raised in the state trial court and the one raised on appeal); *Bloyer v. Peters*, 5 F.3d 1093, 1097 (7th Cir. 1993) (procedural default defense waived because state failed to raise it in district court "in a manner reasonably calculated to alert the court that it was asserting a defense based on waiver"); *Bailey v. Cowley*, 914 F.2d 1438, 1439 (10th Cir. 1990) (although "state courts refused to consider the claims on the merits due to petitioner's procedural default," federal court "deem[s] the defense waived and . . . consider[s] the petition on the merits" because state "did not raise petitioner's procedural default as a defense"); *Merlo v. Bolden*, 801 F.2d 252, 255 (6th Cir. 1987) ("state, by failing [in the state appellate courts] to assert procedural default, waived the right to assert it as an independent ground to support [petitioner's] conviction").

Even those decisions that have approved of the federal habeas court's raising the defense of procedural default *sua sponte* despite the state's failure to raise the defense have not required the dismissal of the claim on this basis. For example, in *Hardiman v. Reynolds*, 971 F.2d 500, 503 (10th Cir. 1993), the Tenth Circuit concluded that it is the federal habeas court's prerogative to raise procedural default *sua sponte* even when state expressly "chooses not to assert its interests." The appellate court reasoned that the state procedural default doctrine "substantially implicates important values that transcend the concerns of the parties to an action." *Id.* The court was careful to note, however, that its holding was "only that a court may raise the state procedural bar defense sua sponte, not that it must raise such a defense if the parties fail to raise it on their own." *Id.* at 504. *See, e.g., Ortiz v. Dubois*, 19 F.3d 708, 714 (1st Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 739 (1995) (court of appeal may raise procedural default issue *sua sponte* despite state's failure to raise it); *Washington v. James*, 996 F.2d 1442, 1448 (2d Cir. 1993), *cert. denied*, 510 U.S. 1078, 114 S.Ct. 895 (1994) (same); *Hull v. Freeman*, 932 F.2d 159, 164 n.4 (3d Cir. 1991) (same); *Burgin v. Broglin*, 900 F.2d 990, 997-98 (7th Cir. 1990) (analogizing to *Granberry v. Greer*, 481 U.S. 129, 107 S.Ct. 1671 (1987), court allows state to raise procedural bar that had not been raised in district court because factual basis for procedural bar defense was not reasonably available at time of district court proceeding). *Cf. Henderson v.Thieret,* 859 F.2d 492 (7th Cir. 1988) (although district court is permitted to consider a waiver defense belatedly raised by the state, even to raise that defense *sua sponte*, the court is not permitted to override the state's decision implicit or explicit to forego that defense).

The Fifth Circuit's conclusion that it is foreclosed from considering petitioner's federal habeas claim because of a procedural bar that it has raised *sua sponte* and must dismiss on that basis

rather than decide the merits of the claim, despite the state's waiver of the affirmative defense, is in conflict with the opinions of the other circuits to address this issue. As with the defense of failure to exhaust, a state procedural default is not a jurisdictional defense. *See Reed v. Ross*, 468 U.S. 1, 9, 104 S.Ct. 2901, 2906-07 (1984) ("Our decisions have uniformly acknowledged that federal courts are empowered under 28 U.S.C. § 2254 to look beyond a state procedural forfeiture and entertain a state prisoner's contention that his constitutional rights have been violated."). Further, given that the state can waive the defense by failing to assert it, this Court's decision in *Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546 (1991), does not require that the appellate court raise the defense *sua sponte* and decide the claim on that basis rather than on the merits.

II. PETITIONER'S CLAIM CHALLENGING THE ENHANCED LOUISIANA SENTENCE ON THE BASIS OF THE UNCONSTITUTIONALITY OF THE UNDERLYING PRIOR MISSISSIPPI CONVICTIONS USED TO ENHANCE THE LOUISIANA SENTENCE, EVEN THOUGH REQUIRING A REVIEW OF THE CONSTITUTIONALITY OF THOSE UNDERLYING PRIOR MISSISSIPPI CONVICTIONS, IS NOT BARRED IN FEDERAL HABEAS CORPUS REVIEW OF THE ENHANCED LOUISIANA SENTENCE FOR WHICH PETITIONER IS IN CUSTODY

It is well-established that the federal district courts have jurisdiction to consider habeas petitions of persons who are "in custody in violation of the Constitution or laws or treaties of the United States." *See Maleng v. Cook*, 490 U.S. 488, 490, 109 S.Ct. 1923, 1925 (1989); 28 U.S.C. Section 2241(c)(3). Under *Maleng*, a habeas petitioner is not "in custody" under a conviction after the sentence imposed for it has fully expired merely because of the possibility that the prior conviction will be used to enhance the sentences imposed for any subsequent crimes of which he is convicted. *Id.* 109 S.Ct. at 1926. However, the Court expressly reserved the issue of whether a prisoner can attack his current sentence by challenging the constitutionality of an earlier, fully

satisfied conviction if the earlier conviction was used to enhance his current sentence. *Id.* 109 S.Ct. at 1927. The federal appellate courts addressing the issue after *Maleng* have concluded that the federal courts do have jurisdiction under 28 U.S.C. Section 2241(c)(3) to review the constitutionality of a prior, fully satisfied conviction if it was used to enhance a current sentence. *See, e.g., Herbst v. Scott*, 42 F.3d 902, 905 (5th Cir. 1995); *Allen v. Collins*, 924 F.2d 88 (5th Cir. 1991); *Young v. Vaughn*, 83 F.3d 72 (3rd Cir. 1996); *White v. Butterworth*, 70 F.3d 573 (11th Cir. 1995); *Gamble v. Parsons*, 898 F.2d 117, 118 (10th Cir.), *cert. denied*, 111 S.Ct. 212 (1990), and authorities cited therein. *See also Custis v. United States*, ___ U.S. ___, 114 S.Ct. 1732, 1746 and n. 7 (1994), Souter, Jr., dissenting ("the Court does not disturb uniform appellate case law holding that an individual serving an enhanced sentence may invoke federal habeas to reduce the sentence to the extent it was lengthened by a prior unconstitutional conviction"). Such a petition, in order to satisfy the "in custody" requirement, (1) must be framed as a challenge to the current conviction and sentence, not the former ones; (2) must be filed in a court with personal jurisdiction and venue to hear a challenge to the current sentence; and (3) must name the petitioner's current custodian as the proper party respondent. Leibman, Section 8.2d, n. 17, p. 201.

A person is in custody in violation of the Constitution if his sentence was enhanced by a conviction obtained in violation of a specific federal right. *See Tucker v. United States*, 404 U.S. 443, 92 S.Ct. 589 (1972); *Burgett v. Texas*, 389 U.S. 109, 88 S.Ct. 258 (1967). This is so because a sentence may not be "founded [even] in part upon misinformation of constitutional magnitude," *Tucker*, 92 S.Ct. at 592, since to do so would be to allow the underlying right to be "denied anew" and to "suffer serious erosion," *Burgett*, 88 S.Ct. at 262. A conviction obtained in violation of the requirement of *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709 (1969), that the record affirmatively

disclose that a defendant who pleaded guilty entered his plea intelligently and voluntarily, should be subject to challenge to the extent that the conviction was used to enhance a sentence and further deny the underlying right.

Petitioner's federal habeas corpus writ properly challenged the validity of the Louisiana sentence of 35 years imprisonment, for which he is currently in the custody of the state of Louisiana, on the basis that it was improperly enhanced by constitutionally invalid prior Mississippi convictions. He framed his constitutional challenge as one directed toward the Louisiana sentence and filed the writ in a federal court with jurisdiction and venue to hear the matter. He named the Louisiana state custodian as the party respondent. The claim was exhausted in the Louisiana state courts, which did not deny relief on any procedural basis, including petitioner's failure to challenge timely the Mississippi convictions in Mississippi state court. Petitioner's constitutional challenge to the enhanced Louisiana sentence on the ground that it was enhanced or lengthened on the basis of prior Mississippi convictions obtained in violation of *Boykin v. Alabama,* given that it was not procedurally barred by a Louisiana state court on the basis of petitioner's failure to file for post-conviction relief from the Mississippi convictions in Mississippi court, is a cognizable claim that should be heard by the federal habeas corpus court. Under the circumstances petitioner should be allowed in federal habeas review to challenge the unconstitutionality of the underlying prior Mississippi convictions at least to the extent of depriving those convictions of the collateral consequence of enhancing the Louisiana sentence, without necessarily voiding the Mississippi convictions for all purposes.

CONCLUSION

For all of the foregoing reasons, petitioner RICHARD F. TREST respectfully prays that this Court grant the writ of certiorari and reverse the judgment of the United States Court of Appeals for the Fifth Circuit dismissing his federal habeas corpus petition, and remand for further proceedings, including an evidentiary hearing, on his claim challenging the constitutionality of his enhanced Louisiana sentence on the basis of the unconstitutionality of the underlying prior Mississippi convictions.

RESPECTFULLY SUBMITTED,

REBECCA L. HUDSMITH
Louisiana Bar Number 7052
Federal Public Defender
Western & Middle Districts of Louisiana
102 Versailles Boulevard, Suite 816
Lafayette, Louisiana 70501
Telephone 318-262-6336
Facsimile 318-262-6605

ATTORNEY FOR PETITIONER

APPENDIX A

Richard F. TREST, Petitioner-Appellant,
v.
John P. WHITLEY, Warden, Louisiana State Penitentiary, Respondent-Appellee.

No. 94-40515.

United States Court of Appeals,
Fifth Circuit.

Sept. 17, 1996.

Louisiana prisoner adjudicated an habitual offender filed petition for writ of habeas corpus, alleging that Louisiana trial court erred in relying on prior Mississippi convictions because predicate convictions were unconstitutional. The United States District Court for the Western District of Louisiana, Tom Stagg, J., denied petition, and petitioner appealed. The Court of Appeals, Edith H. Jones, Circuit Judge, held that petitioner was procedurally barred from challenging prior convictions used to trigger career offender enhancement, where challenge would have been time barred in Mississippi state court.

Affirmed.

Robert M. Parker, Circuit Judge, filed dissenting opinion.

[1] HABEAS CORPUS ⇐ 842
197k842
When considering requests for federal habeas corpus relief, Court of Appeals reviews district court's factual findings for clear error, but reviews issues of law de novo.

[1] HABEAS CORPUS ⇐ 846
197k846
When considering requests for federal habeas corpus relief, Court of Appeals reviews district court's factual findings for clear error, but reviews issues of law de novo.

[2] HABEAS CORPUS ⇐ 342
197k342
Louisiana prisoner who was adjudicated an habitual offender on basis of prior Mississippi convictions was procedurally barred from challenging prior convictions on federal habeas review, where claim would have been time barred in Mississippi state court. 28 U.S.C.A. § 2254; Code 1972, § 99-39-5(2).

[3] HABEAS CORPUS ⇐ 314
197k314
If habeas petitioner has failed to exhaust state remedies and state court to which petitioner would have been required to present his claims in order to meet exhaustion requirement would find claims procedurally barred, there is procedural default for purposes of federal habeas.

[4] HABEAS CORPUS ⇐ 401
197k401
Procedural default will bar all federal habeas review of claim that conviction was unconstitutional unless prisoner can demonstrate cause for default and actual prejudice as result of alleged violation of federal law or demonstrate that failure to consider claim will result in fundamental miscarriage of justice.

[4] HABEAS CORPUS ⇐ 404
197k404
Procedural default will bar all federal habeas review of claim that conviction was unconstitutional unless prisoner can demonstrate cause for default and actual prejudice as result of alleged violation of federal law or demonstrate that failure to consider claim will result in fundamental miscarriage of justice.

***1006** Rebecca L. Hudsmith, Asst. Federal Public Defender, Lafayette, LA, for Appellant.

James M. Bullers, Dist. Atty's Office, Benton, LA, for Appellee.

Appeal from the United States District Court for the Western District of Louisiana.

Before JONES, STEWART and PARKER, Circuit Judges.

EDITH H. JONES, Circuit Judge:

Appellant Richard F. Trest ("Trest") appeals the district court's denial of his petition for a writ of habeas corpus. Because his petition raises forfeited claims that are procedurally barred from review by this court, the judgment of the district court is AFFIRMED.

FACTUAL BACKGROUND

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After a jury trial, Trest was convicted in 1979 of armed robbery in Bossier Parish, Louisiana. Three years before this conviction Trest had pleaded guilty to five felony counts of burglary in Mississippi. The Mississippi state court sentenced Trest to serve concurrent four year terms for his offenses, and he was released from prison in Mississippi in 1978. Based on these prior felony convictions for burglary in Mississippi, the Louisiana trial court adjudicated Trest an habitual offender and sentenced him to 35 years imprisonment, without possibility of parole, probation, or suspended sentence. See La.R.S. 15:529.1. Trest concedes that during his habitual offender proceedings he failed to object to the Louisiana court's reliance on the Mississippi convictions on the basis that these convictions were somehow constitutionally invalid. Trest did not appeal his convictions in Mississippi and has never challenged their validity in any Mississippi court, either on direct or collateral appeal. Rather, he served his concurrent sentences until he became eligible for release from prison.

Trest filed his petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 on September 30, 1991. In this petition, Trest alleges for the first time that the Louisiana trial court erred in relying on his prior Mississippi convictions because these predicate convictions were unconstitutional. Specifically, Trest contends, inter alia, that because the Mississippi court purportedly failed to advise him of his constitutional rights and of the maximum sentence he could receive, the convictions used to enhance his Louisiana ***1007** sentence were constitutionally infirm. [FN1] To support his petition, Trest submitted a copy of the habitual offender bill of information filed against him and the transcript of the hearing on this bill. The government did not respond specifically to this potential ground for relief in its answer to Trest's petition. Likewise, the magistrate judge's report and recommendation did not directly address the issue. Trest stressed this silence in his objections to the report and recommendation. While Trest acknowledged that his claim had been poorly articulated, he rearticulated it, and attached for the district court a copy of the transcript of his 1976 guilty pleas in Mississippi state court. After considering Trest's petition for writ of habeas corpus, the district court denied it.

FN1. To buttress the claim that the Mississippi convictions are somehow unconstitutional, Trest relies on Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274 (1969), in which the Supreme Court held that "[i]t was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary."

DISCUSSION

[1] When considering requests for federal habeas corpus relief, this court has frequently explained that we review the district court's factual findings for clear error, but review issues of law de novo. See, e.g., Myers v. Johnson, 76 F.3d 1330, 1333 (5th Cir.1996).

[2] In the instant case, however, this court's decision in Sones v. Hargett, 61 F.3d 410 (5th Cir.1995), precludes us from reviewing the merits of Trest's habeas challenge to the constitutionality of his Mississippi convictions because his petition raises claims that were forfeited by Trest and are procedurally barred from appellate scrutiny. [FN2] In Sones, this court held that an inmate who had been sentenced under Mississippi's habitual offender statute to life in prison without parole was properly denied habeas relief for his claim that his trial counsel was constitutionally ineffective because this claim would have been time barred had it been included in a state petition for habeas and, thus, was procedurally defaulted for purposes of federal habeas. Sones, 61 F.3d at 416.

FN2. Inexplicably, neither of the parties cited Sones or discussed it in their briefs, oral arguments, or memoranda to this court.

The procedural default in Sones is replicated in the instant appeal. As Sones observes, Mississippi imposes the following procedural bar on all efforts at collateral relief from a conviction and sentence:

> A motion for relief under this chapter shall be made within three years after the time in which the prisoner's direct appeal is ruled upon by the Supreme Court of Mississippi or, in case no appeal is taken, within three (3) years after the time for taking an appeal from the judgment of conviction or sentence has expired, or in case of a guilty plea, within three (3) years after entry of the judgment of conviction.

Miss.Code Ann. § 99-39-5(2) (emphasis added);

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Sones, 61 F.3d at 417 (emphasis added); see also, Lott v. Hargett, 80 F.3d 161, 163 (5th Cir.1996). In Odom v. State, 483 So.2d 343 (Miss.1986), the Mississippi Supreme Court declared that this procedural bar applied prospectively to all convictions occurring prior to April 17, 1984, the statute's effective date; hence, Mississippi convictions before April 17, 1984 can be challenged collaterally only if the challenge is filed in a petition for post-conviction relief by April 17, 1987. Sones further explains that Mississippi's procedural bar also extends to constitutional challenges against the predicate convictions triggering habitual offender status:

> the Mississippi Supreme Court has consistently held that an attack on a facially valid prior conviction, used either as an aggravating circumstance in capital sentencing or as a basis for a sentence as a habitual offender, must be brought after sentencing in a petition for post-conviction relief from that prior judgment of conviction.

See Sones, 61 F.3d at 418 n. 14 (emphasis added); see also, Phillips v. State, 421 So.2d 476, 481 (Miss.1982); Culberson v. State, 612 So.2d 342, 343-47 (Miss.1992).

Because Sones did not challenge the prior convictions used to trigger the career offender *1008 enhancement in petitions for post-conviction relief filed within the three-year statute of limitations, this court considered the challenge forfeited. We reasoned that,

> [f]or the first time on appeal, Sones's counsel argues that his prior convictions are void on their face for failing to indicate whether the guilty pleas on which they were based were knowing and voluntary. We consider this novel argument forfeited. Although we may consider a forfeited claim if it presents a purely legal question and if failure to consider it will result in manifest injustice, the issue whether Sones's prior convictions were based on voluntary and knowing pleas is not purely a question of law.... Because this issue thus involves factual as well as legal questions, we will not consider it for the first time on appeal.

Sones, 61 F.3d at 419 n. 18 (citations omitted) (emphasis added); see also, Lott, 80 F.3d at 164-66 (inmate in Mississippi denied federal habeas corpus review of his Boykin claim because Mississippi's procedural default statute is an independent and adequate rule barring such review). [FN3] Indeed, the importance of enforcing Mississippi's procedural bar and of preventing the retrial of the predicate offenses used to trigger a habitual offender enhancement has been reiterated by the Mississippi Supreme Court, which has stressed that

> [i]n fulfilling its mission to determine whether a prior conviction is constitutionally valid for the purpose of enhancing a defendant's sentence, the trial court must not be placed in position of 'retrying' the prior case. Certainly any such frontal assault upon the constitutionality of a prior conviction should be conducted in the form of an entirely separate procedure solely concerned with attacking that conviction. This role is neither the function nor the duty of the trial judge in a hearing to determine habitual offender status.

Phillips v. State, 421 So.2d 476, 481-82 (Miss.1982); Sones, 61 F.3d at 419.

For the same reasons that Sones was procedurally barred from challenging the prior convictions used to trigger his career offender enhancement, Trest is likewise barred. As has been discussed, while Trest was convicted in 1979 for armed robbery in Louisiana, his prior convictions occurred in Mississippi. The Mississippi convictions that provided the basis for the enhancement of the Louisiana sentence arose as a result of Trest's pleas of guilty to five counts of burglary on May 24, 1976. Trest neither appealed these convictions nor challenged them collaterally. Although he was sentenced to serve concurrent four year terms of imprisonment on the five counts, he left prison when he became eligible for release, in February of 1978.

FN3. Indeed, because Sones's attorney could not have raised these forfeited challenges to the prior convictions at sentencing for the enhanced conviction, this court denied Sones's habeas claim that he suffered from constitutionally ineffective counsel. As the panel explained, [c]ounsel therefore could not have successfully challenged the constitutionality of the prior convictions in the sentencing phase; as mentioned above, in Mississippi constitutional challenges to the validity of prior convictions that are not facially invalid must be made collaterally, and Sones has never sought collateral relief from the prior convictions that qualify him as a habitual offender. We perceive no attorney constitutional ineffectiveness.... Accordingly, we reject Sones's contention that denying federal review of his Sixth Amendment claim would result in a fundamental miscarriage of justice. Sones, 61 F.3d at 420. Trest confronts precisely the same predicament as he has never challenged the prior convictions that qualify him as a habitual offender in any post-conviction or collateral proceeding in Mississippi.

[3] Mississippi's procedural bar, the Mississippi Supreme Court, and this court in Sones mandate that Trest had until April 17, 1987 to file a petition for post-conviction relief from his Mississippi convictions. Since Sones did not comply with this requirement, his challenges to the constitutionality of his Mississippi convictions have been procedurally defaulted. Put differently, because the potential remedies in Mississippi courts for the constitutional defects alleged by Sones were rendered unavailable by his own procedural default, federal courts, including those in Louisiana, are barred from reviewing these claims. Sones, 61 F.3d at 416; Lott, 80 *1009 F.3d at 164. As the Supreme Court has instructed,

> [I]f the petitioner failed to exhaust state remedies and the court to which petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred, ... [then] there is a procedural default for purposes of federal habeas.

Coleman v. Thompson, 501 U.S. 722, 735 n. 1, 111 S.Ct. 2546, 2557 n. 1, 115 L.Ed.2d 640 (1991).

[4] The only potential remedies available to cure Trest's procedural default are to demonstrate either cause and prejudice for the default or that a fundamental miscarriage of justice will result from our failure to analyze his claims. Again, the Supreme Court has explained that procedural default will block all federal review of a claim that a conviction was unconstitutional unless the prisoner "can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman, 501 U.S. at 750, 111 S.Ct. at 2565 (emphasis added). In the instant case, Trest neither alleges such cause and prejudice nor a fundamental miscarriage of justice; indeed, Trest has not even attempted to bear this burden. Hence, a federal district court in Louisiana cannot consider Trest's claims that his Mississippi convictions were somehow unconstitutional. As a result, this court is bound to conclude as we did in Sones: "section 99-39-5(2) functions as an independent and adequate procedural bar to review [of the constitutional claims raised by Trest] in federal court." Sones, 61 F.3d 410, 417-18; see also, Lott, 80 F.3d at 165.

Because this court concludes that it is foreclosed from considering the merits of Trest's habeas petition, we need not decide whether Custis v. United States, 511 U.S. 485, 114 S.Ct. 1732, 128 L.Ed.2d 517 (1994) would entitle Trest, had he not procedurally defaulted, to review in a federal habeas corpus proceeding of his claim that his prior Mississippi convictions were unconstitutional and that, as a result of this alleged constitutional infirmity, his current sentence has been improperly enhanced.

CONCLUSION

For the foregoing reasons, the judgment of the district court denying Trest's petition for federal habeas corpus relief is AFFIRMED.

ROBERT M. PARKER, Circuit Judge, dissenting:

The independent and adequate state ground doctrine applies to bar federal habeas corpus relief when a state court declines to address a prisoner's federal claims because the prisoner has failed to meet a state procedural requirement. Coleman v. Thompson, 501 U.S. 722, 729, 111 S.Ct. 2546, 2553-54, 115 L.Ed.2d 640 (1991). For the independent and adequate state ground doctrine to apply, the state court adjudicating a habeas petitioner's claims must explicitly rely on a state procedural rule to dismiss the petitioner's claims. Sones v. Hargett 61 F.3d 410, 416 (5th Cir.1995). The procedural default doctrine presumes that the state court's express reliance on a procedural bar functions as an independent and adequate ground in support of the judgment. Id. The petitioner can rebut this presumption by establishing that the procedural rule is not strictly or regularly followed. Id.; see also, Moore v. Roberts, 83 F.3d 699 (5th Cir.1996). Additionally, Petitioner might defend his position by demonstrating cause and prejudice for his failure to raise the claim in state proceedings. See Gray v. Netherland, --- U.S. ----, ----, 116

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S.Ct. 2074, 2082, 135 L.Ed.2d 457 (1996). By failing to raise the procedural default as a defense, the State lost the right to assert that defense. Id.

In this case, the Louisiana court did not explicitly rely on the Mississippi statute of limitations, nor did the petitioner have the opportunity to rebut any resulting presumption. The majority's observation that Trest did not even attempt to bear his burden of establishing cause and prejudice is central to the flaw in their reasoning. How can this Court penalize Trest for failing to respond to the state's affirmative defense of procedural bar, when the State declined to raise such a defense?

***1010** For these reasons, I dissent from the majority's holding that petitioner was procedurally barred from challenging the prior convictions.

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APPENDIX B

Signed
Clsd 5/16/94

U. S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED
MAY 16 1994
ROBERT H. SHEMWELL, CLERK
BY _____ DEPUTY

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

SHREVEPORT DIVISION

RICHARD FRANKLIN TREST

VERSUS

JOHN P. WHITLEY, WARDEN
LOUISIANA STATE PENITENTIARY, ET AL.

CIVIL ACTION NO. 91-2131

JUDGE STAGG

MAGISTRATE JUDGE PAYNE

J U D G M E N T

For the reasons stated in the Report and Recommendation of the Magistrate Judge previously filed herein, having thoroughly reviewed the record, including the written objections filed, and concurring with the Magistrate Judge's findings under the applicable law;

IT IS ORDERED that petitioner's application for a writ of habeas corpus is **DENIED.**

THUS DONE AND SIGNED at Shreveport, Louisiana, this the 13th day of May, 1994.

TOM STAGG, UNITED STATES DISTRICT JUDGE

JUDGEMENT ENTERED 5/16/94
BY C. E. Davis
COPY TO Trest
Bullers

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APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40515

U.S. COURT OF APPEALS
FILED
OCT 29 1996
CHARLES R. FULBRUGE III
CLERK

RICHARD F. TREST,

Petitioner - Appellant

versus

JOHN P. WHITLEY, Warden,
Louisiana State Penitentiary

Respondent - Appellee.

Appeal from the United States District Court for the
Western District of Louisiana

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 09/17/96, 5 Cir., _____), _____F.3d _____)

Before JONES, STEWART and PARKER, CIRCUIT JUDGES.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Judges who are in regular active service not having voted in favor, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

Edith H. Jones
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

ROBERT M. PARKER, Circuit Judge, Dissenting

APPENDIX D

5/1000

U.S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FEB 7 1992
BY _____ DEPUTY

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

SHREVEPORT DIVISION

RICHARD FRANKLIN TREST — CIVIL ACTION NO. 91-2131

versus — JUDGE STAGG

JOHN P. WHITLEY, WARDEN
LOUISIANA STATE PENITENTIARY, ET AL. — MAGISTRATE JUDGE PAYNE

REPORT AND RECOMMENDATION

Currently before the court is an application for a writ of habeas corpus filed in forma pauperis by pro se petitioner, Richard Franklin Trest, pursuant to 28 U.S.C. §2254. This matter was referred to the undersigned for report and recommendation in accordance with the standing order of this court.

Petitioner challenges his 1979 conviction as a multiple offender (La.R.S. 15:529.1) and a second offender of armed robbery. He was sentenced to 35 years of incarceration without benefit of parole, probation or suspension of sentence by the 26th Judicial District Court, Bossier Parish, Louisiana. He is presently confined in the Louisiana State Penitentiary, at Angola, Louisiana ("Angola"). Named as respondent is the Warden at Angola, John P. Whitley.

Petitioner has exhausted his state court remedies by application for post-conviction relief/writ of habeas corpus in the 26th Judicial District Court, and to the Louisiana Supreme Court which both denied him relief. The petitioner contends that his

(1) M

incarceration is unconstitutional based on the single argument that he was denied due process in violation of the Fourteenth Amendment of the United States Constitution "in that the entire multiple offender proceedings was unconstitutional". More specifically, the plaintiff alleges nine separate errors which he contends violated his constitutional rights:

> "(1) The Trial Court erred by not quashing the multiple offender bill of information as being vindictive by the prosecutor.
>
> "(2) The Trial Court failed to inform petitioner of the right to be tried as to the truth of the multiple offender bill of information as to a "formal hearing".
>
> "(3) The Trial Court failed to inform petitioner of the requirement to say whether the allegations within the multiple offender charge were true.
>
> "(4) The Trial Court erred by allowing defense counsel to enter the not guilty plea to said charge.
>
> "(5) The Trial Court failed to advise petitioner of the right to "remain silent" and not to incriminate himself as to prior felony conviction.
>
> "(6) There was insufficient evidence during Multiple Offender trial to show whether or not the prior felony conviction ended in a pardon.
>
> "(7) The evidence introduced by the State as to prior felony convictions was illegally entered into the evidence.
>
> "(8) The Trial Court erred by ordering said Second Offender sentence to be without parole.
>
> "(9) The Trial Court erred by not indicating the factors it had considered for imposing the sentencing in the record as required by L.S.A.-C.Cr.P. Article 894.1."

Claim No. 1

At the hearing on the habitual offender bill of information, held on June 8, 1979, the defense attorney called the prosecutor to the stand concerning plea discussions prior to the trial of the

primary charge of armed robbery. The prosecutor testified that if the defendant pled guilty as charged, that he would not be prosecuted as a multiple offender, but that if he elected to go to trial and lost, he would be prosecuted as a multiple offender. See Tr. 5-8.

The defendant cites **Hayes v. Cowen**, 547 F.2d 42 (5th Cir. 1976), which presents a different factual situation from the instant case. In Hayes, supra, the prosecutor increased the original charges to a more serious offense after the defendant's refusal to plead guilty. The facts of this case are different from those presented to the court in Hayes. Here, the defendant was prosecuted under an existing indictment. Defense counsel was advised that the defendant had a choice of pleading guilty as charged without facing the enhanced penalty provisions of L.R.S. 15:529.1, or going to trial and risking the possibility of an enhanced penalty if he was found guilty. This was part of a plea bargaining process, in which prosecutors have reasonable flexibility. An offer to forego pursuing a multiple offender bill is within constitutional limits. See Bordenkircher v. Hayes, 434 U.S. 357, 98 S.Ct. 663 (1978). Furthermore, the prosecutor need not have even made the choice until after the trial, without ever having given the defendant a choice. See La.R.S. 15:529.1 As such, the court does not find that the defendant's constitutional right to due process was violated by the actions of the prosecutor.

Claims 2, 3 and 4:[1]

In these claims, the petitioner contends that: (1) the trial court failed to inform him of his right to be tried as to the truth of the multiple offender allegations; (2) the trial court failed to inform him of the requirement to say whether the allegations were true; and (3) the trial court erred in allowing the defense counsel, rather than petitioner himself, to enter the plea.

The Constitution requires that, in sentencing procedures, a state provide an alleged habitual criminal with reasonable notice and an opportunity to be heard. See Gardner v. Florida, 430 U.S. 349, 358, 97 S.Ct. 1197, 1205 (1977). Louisiana has enacted R.S. 15:529.1 which contains procedures to be followed for habitual offender proceedings.

In this case, the State followed the provisions of 15:529.1 in that the defendant was given notice by the State filing a formal bill of information, alleging that the defendant was a multiple felony offender, with the bill also setting out the details of his prior felony convictions. (See State's Answer, Attachment No. 5) The defendant was thereafter called before the court to answer this bill of information, at which time the defendant waived arraignment and through counsel entered a plea of not guilty to the habitual

---

[1] The court fails to see any constitutional significance in the allegations in claims 2 and 3 and considers claim 4 to encompass whatever objection the plaintiff intended to make in claims 2 and 3. There are no technical, statutory, constitutional or magic words which the judge is required to recite. It is sufficient that the defendant was presented with the charges and asked to plead and then given an opportunity to refute those charges should he have chosen.

offender bill. (See State's Answer, Attachment No. 6) Thereafter a hearing was held and evidence presented from which the court was able to determine that the defendant was in fact a second felony offender. (See State's Answer, Attachment No. 7)

It is sufficient that the defendant was present at the arraignment on the bill with his attorney and that through his attorney he entered a plea of not guilty. Because he denied the allegations, a hearing was subsequently held which provided the defendant a full opportunity to be heard on all matters. There is no authority to suggest that either Louisiana law or constitutional due process requires that the defendant himself has to utter his plea or denial.

Claim No. 5:

The defendant contends that the trial judge knew that a multiple offender charge was forthcoming against the petitioner and failed to advise him not to incriminate himself as to his prior felony convictions during testimony given at the armed robbery trial.

At a habitual offender proceeding, the state must prove, among other things, that the defendant was convicted of a prior felony. See State v. Sylvas, 558 So.2d 1192 (La. App. 1st Cir. 1990). Prima facie proof of a prior felony conviction may be established by compliance with the state's statute. However, this is not the exclusive method of proving a prior felony conviction, and any other competent evidence may be used to establish such proof. See State v. Moten, 510 So.2d 55 writ denied, 514 So.2d 126.

The defendant was clearly under oath and sworn to tell the truth at his armed robbery trial. At that trial, the defendant was represented by counsel. Both the defendant and his counsel were informed by the prosecutor of potential habitual offender charges being brought if the defendant chose to go to trial. The defendant was under oath when he made the incriminating statements, not the subject of an interrogation at which he was unrepresented by counsel. The petitioner's argument is misplaced. Boykin assures that guilty pleas are given voluntarily. Here, the defendant pled guilty neither to armed robbery or the multiple offender bills. A guilty plea in state court is susceptible to a constitutional challenge that it was not voluntarily made if it can be shown that the defendant was not first advised of his privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront his accusers. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 1712 (1969). However, the Fourteenth Amendment does not require that a state defendant be informed of habitual criminal charges prior to his conviction on a primary charge. See Westling v. Bennett, 410 F.2d 205 (C.A. Iowa 1969), cert denied, 90 S.Ct. 384; Stewart v. Cunningham, 550 A.2d 96. As such, at the defendant's trial on the primary charges of armed robbery, he was free to testify or not to testify as he chose while the court had no duty to warn him prior to his testimony that the State of Louisiana might file a habitual offender bill. Since the statements clearly were not taken in violation of any constitutional protections, neither does their introduction as evidence of

his prior convictions for purposes of the habitual offender sentencing offend the Constitution. The only due process requirements attached to the multiple offender hearing are that the defendant be given notice and a chance to controvert the allegations and both were complied with. There was no constitutional violation involved. Furthermore, the court finds that the Boykin decision is totally inapplicable here since, with the assistance of counsel, the defendant exercised his rights to refute the charges both as to the primary charges and as to the habitual offender bill.

Claim No. 6:

Under Louisiana law relating to habitual offender proceedings, it is required that the prior felony conviction and the defendant's identity be proved. In this case, the state presented evidence which established defendant's prior felony convictions sufficiently to satisfy constitutional safeguards. Whether or not a prior felony conviction ended in a pardon is not upon the state to prove. Should the defendant contend he had been pardoned, the burden would have fallen on him to make this assertion and establish it to the satisfaction of the court. See Foots v. State of Louisiana, 793 F.2d 610 (5th Cir. 1986).

Claim No. 7:

Defendant alleges that he was determined to be a multiple felony offender on the basis of improper evidence. Fundamental requirements of due process, when a habitual criminal statute is to be invoked, are reasonable notice and an opportunity for a full

and complete hearing with the right to the aid of competent counsel. See Johnson v. State of Kansas, 284 F.2d 344 (8th Cir. 1960). The evidence presented in this case included conviction records from the State of Mississippi with fingerprints. The State also presented an expert witness who positively identified the fingerprints in the conviction records to match those of the defendant. The court did consider as well the defendant's testimony at his primary trial and concluded that the defendant was the same person and was therefore a second felony offender. This procedure, as dictated by the laws of the State of Louisiana, meets the due process requirements of the Fourteenth Amendment to the Constitution.

Claims No. 8 and 9:

After determining that defendant was a second felony offender, the court concluded the penalty range to be from 33 years to 198 years, without benefit of parole or suspension of sentence. In determining the exact number of years, the trial judge should apply the provisions of the Code of Criminal Procedure, Art. 894.1. Section 64 of the Louisiana Criminal Code mandates that the court impose a sentence in armed robbery cases of not less than 5 years nor more than 99 years and further requires that the sentence be without benefit of parole, probation or suspension. The sentencing guidelines for determining appropriate sentences in a particular case are set forth in Louisiana Code of Criminal Procedure, art.

894.1. The defendant argues that R.S. 15:529.1(A)(i),[2] the Multiple Offender Statute, does not prohibit parole for Second Offenders, and, as such, the trial judge erred in prohibiting parole. The petitioner's original sentence was for Armed Robbery, R.S. 14:64, a sentence which prohibits parole. The judge's apparent interpretation of the laws, when applied in conjunction, gave him the discretion to allow for parole according to the circumstances. That the petitioner disagrees with the judge's interpretation provides no basis for federal habeas corpus relief since no question of a constitutional nature is raised. Carrizales v. Wainwright, 699 F.2d 1053 (1st Cir. 1983); Jones v. Theriot, 846 F.2d 457 (7th Cir. 1988).

The petitioner further argues that the trial court erred by not indicating the factors it had considered for imposing the sentencing in the record as required by C.Cr.P. art. 894.1. This court is also foreclosed from consideration of the alleged failure to follow the state's sentencing procedures because such failure is not a constitutional question reviewable on a federal habeas corpus petition. Jones v. Estelle, 622 F.2d 124, 126 (5th Cir. 1980), cert. denied, 449 U.S. 996, 101 S.Ct. 537 (1980).

Accordingly,

IT IS RECOMMENDED that the petition for a writ of habeas corpus be **DENIED.**

---

[2] La.R.S. 15:529.1(A)(1) provides in part: "... upon conviction of a second felony offense, such person shall be eligible for parole consideration upon serving one-half of the sentence imposed."

Objections

Under the provisions of 28 U.S.C. §636(b)(1)(C) and Fed.R.Civ. Proc. 72(b), parties aggrieved by this recommendation have ten (10) business days from service of this report and recommendation to file specific, written objections with the Clerk of Court. A party may respond to another party's objections within ten (10) days after being served with a copy thereof. Counsel are directed to furnish a courtesy copy of any objections or responses to the district judge at the time of filing.

Failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) business days from the date of its service, or within the time granted pursuant to Fed.R.Civ.Proc. 6(b), shall bar an aggrieved party from attacking the factual findings on appeal except upon grounds of plain error or manifest injustice. See Thomas v. Arn, 474 U.S. 140, 106 S.Ct. 466 (1985); Carter v. Collins, 918 F.2d 1198, 1203 (5th Cir. 1990).

THUS DONE AND SIGNED at Shreveport, Louisiana, on this the 2d day of February, 1994.

ROY S. PAYNE
UNITED STATES MAGISTRATE JUDGE

COPY SENT
DATE 2-2-94
BY cm
TO: Trial Bullers

APPENDIX E

U. S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED
FEB 18 1994
ROBERT H. SHEMWELL, CLERK
BY
DEPUTY

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

SHREVEPORT DIVISION

RICHARD FRANKLIN TREST — CIVIL ACTION NO. 91-2131

VERSUS — JUDGE STAGG

JOHN P. WHITLEY, WARDEN (LSP) — MAGISTRATE JUDGE PAYNE

OBJECTION TO MAGISTRATE'S REPORT AND RECOMMENDATION

NOW INTO COURT COMES RICHARD FRANKLIN TREST (Petitioner herein) objecting to Magistrate Judge Payne's Report and Recommendation . Said Report and Recommendation is dated February 2, 1994, and received by Petitioner at the Louisiana State Penitentiary, Angola, Louisiana on or about February 9, 1994. Petitioner objects as follows:

1.

Petitioner's writ of habeas corpus raised nine (9) specific claims and the Report and Recommendation recommended that all nine claims be dismissed. Therefore, Petitioner will make a general objection relative to all nine (9) claims.

2.

Petitioner, (like many, who are incarcerated in the Louisiana State Penitentiary, Angola, Louisiana) is not knowledge in the science of law. Petitioner had been assisted by one of Angola's Writ Writers. Claim 7 in the writ is based upon two parts, titled A and B. The Report and Recommendation did not address section B of claim 7. A review of the writ(s) that were raised in State and

Federal Court; unskilled and obscurely raised in subsection B of Claim 7 is a substantial violation that warrants review by this court. In essence, Petitioner has raised the issue that his prior conviction in the State of Mississippi was judicial deficient in that the prior guilty plea was unconstitutional, because it did not comply with constitutional safe-guards.

3.

Petitioner is currently incarcerated in the Louisiana State Penitentiary, Angola, Louisiana. Petitioner was charged by Bill of Information for Armed Robbery, a violation of LSA-R.S. 14:64. After the conclusion of trial, Petitioner was found guilt. The State of Louisiana then filed a Multiple Offender Bill of Information under the provisions of LSA-R.S. 15:529.1 charging Petitioner as a Second Offender. Petitioner was subsequently convicted and sentenced to an enchancement term of thirty-five (35) years without benefit of parole, probation, or suspension of sentence due to Petitioner's prior guilty plea in the State of Mississippi. Petitioner asserted this claim in section B of Claim 7 in his post conviction/writ of habeas corpus in the State Court(s), and maintained the exact posture in this court. The claim resting in muddy waters is nevertheless well preserved. However, the Magistrate Judge's Report and Recommendation failed to address this claim, Petitioner objects and moves for review of this claim.

4.

The State of Louisiana denied Petitioner due process of law when failing to comply with the standards announced in State v.

Santiago, La. 416 So. 2d 524 that a guilty plea in a Louisiana State Court subsequent to December 8, 1971 (date of State ex rel. Jackson v. Henderson, 260 La. 90, 255 So. 2d 85 (1971) became final) may not be used to enhance punishment in a habitual offender proceedings unless the record affirmatively discloses that the plea was constitutionally valid. State v. Holden, 375 So. 2d 1372 (La. 1979).

The State Court(s) failed to hold an evidentiary hearing on this claim.

5.

On May 24, 1976 in the State of Mississippi, Country of Jackson, Pascagoula, Mississippi in the Circuit Court of Jackson County, Mississippi with the Honorable Darwin M. Maples, Presiding Judge appeared three teen-age defendants ages 17 and 18 by the name of St. Clair Locke, Richard Trest, and Tommy Bryant. Each defendant was represented by counsels.

The three teen-age defendants entered guilty pleas and the court subsequently imposed sentence.

The guilty plea entered by Richard Trest is constitutionally deficient in that the plea does not conform to Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709.

The Court failed to advise Petitioner that:

1. By pleading guilty, he waived his rights to trial by jury, privilege against compulsory self-incrimination, and his right to confront accusers. See Page 5 of the Mississippi Boykin transcript attached. The record indicates that the court advised the two codefendants, but did not petitioner to these basic

rights.

The United States Supreme Court held in McCarthy v. United States , 89 S.Ct. 1166 (1969) that a defendant who waives these basic rights, it must be an intentional relinquishment or an abandoment of a known right or privilege. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant posses an understanding of the law in relation to the facts.

2. The court failed to inquire if the plea was voluntarily, coecered, or as a results of threats and intimidation.

3. The court failed to advise that if Petitioner elected to be tried by jury and found guilty that he would have a right to appeal. And, if he couldn't afford an attorney, one would be appointed.

4. The court failed to advise Petitioner of the minimum and maximum sentence. See the following excerpt given by the court:

BY THE COURT

I could give some of you up to ten or thirty or forty years in the penitentiary; this is the type of crime you have committed. It's very serious. (See Miss. Boykin Tr. p. 8 attached).

In Fortia v. United , 456 F. 2d 194 (1972), the Court held that the records did not show that Fortia was informed of the maximum possible sentences that could be imposed. A guilty plea

is invalid as not being understanding entered if a defendant does not know the maximum penalty possible for the offense. United States ex rel. Hill v. United States, 5th Cir. 1971, 452 F. 2d 664, United States v. Perwo, 5 Cir. 1970, 433 F. 2d 1301.

The Louisiana Supreme Court set the standards in State v. McGinnis, La. 413 So. 2d 1307 as to non-Louisiana and federal pleas of guilty. On rehearing this court held that the records failed to show that the defendant was ever informed of his privilege against self-incrimination in the prior conviction which was later used for enhancement purpose in a Louisiana Multiple Offender hearing. The court reversed and remanded.

5. Court gave contradictory instructions as to the charges pending against Petitioner and Tommy Bryant. See the following excerpt:

BY THE COURT

All right, Trest and Bryant, you have been indicted on four charges, and the other defendant, Locke, you have been indicted on me. Do you understand that? (Miss. Boykin Tr. page 2, Lines 6-9)

BY THE COURT

Now, the other two defendants, you are charged with burglary and larcency on five offenses. Do you understand that, Bryant? Trest? (Miss. Boykin Tr. p. 6, Lines 15-17).

The Court had explained to St. Clair Locke that he was charged with one count. See (Miss. Boykin Tr. pp. 2 & 6).

In Banks v. McGougan, 717 F. 2d 186 (1983) the court held at p. 190-191 that it is necessary, however that the record show that the plea was intelligently and voluntarily made citing McChesney

v. Henderson, 484 F. 2d 1101, 1106 (5th Cir. 1973), cert. denied, 414 U.S. 1146, 94 S.Ct. 901, 39 L.Ed. 2d 102 (1974).

6. The Court failed to informed Petitioner of the essential elements of the crime even tho the court requested a recitation of the facts of each offense.

The constitution requires that the accused be informed of the elements of the crime charged. Henderson v. Morgan, 426 U.S. 637, 96 2253, 49 L.Ed. 2d 108 (1976).

In Boykin v. Alabama, supra the court held that a guilty plea is not valid unless it is an intelligent and voluntary choice on the part of the accused. The Boykin decision explains that a guilty plea constitutes a conviction without a trial; for that reasons, a defendant should be made aware of the rights that are automatically waived by choice to forego trial; the privilege against compulsory self-incrimination; the right to trial by jury; and the right to confront one's accusers. As interpreted by the La. S.Ct., the Boykins decision requires "an express and knowing waiver of at least these three federal constitutional rights". State ex rel Jackson v. Henderson, supra.

The decision to plea guilty is not deemed an intelligent and understanding choice unless the defendant is informed of the rights which attach at trial. While an understanding of the triad of rights may be the sine qua non for the acceptance of a guilty plea, it is also true that other factors may have a bearing on the validity of the plea. A mere recitation of rights does not always insure the intelligent and voluntary nature of the plea. For evidentiary purposes, the record must contain an affirmative

showing that demonstrates the understanding and voluntary nature of the plea. State v. Halsell, 403 So. 2d 688 (La. 1981).

For the reasons cited herein this Court is respectfully requested to consider section B of Claim 7. The issues presented herein are not new, the claim was properly raised and preserved throughtout the course of the post conviction/writ of habeas corpus application - the essential facts were raised unskillfully and obsured, but nevertheless raised and preserved.

WHEREFORE a review and disposition is warranted. Petitioner submits that he is entitled to relief.

Respectfully submitted,

Richard Franklin Trest
D.O.C. #91171
Pine #4
La. State Penitentiary
Angola, Louisiana 70712

prepared by:

Walter Burnette
and
G. Ashanti Witherspoon
Inmate Counsels
Legal Program's Criminal Ligitation Team
Louisiana State Penitentiary
Angola, Louisiana 70712

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy fo the foregoing pleading has been served upon Mr. James M. Bullers, District Attorney, 26th Judicial District, Bossier Parish Courthouse, Benton, Louisiana 71006 via United States Mail, postage prepaid, first class on this 12th day of February, 1994.

Richard Franklin Trest

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

RICHARD F. TREST,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

CERTIFICATE OF SERVICE

I, Rebecca L. Hudsmith, a member of the Bar of this Court, hereby certify that on this 27th day of January, 1997, one copy of the Petition for Writ of Certiorari and of the Motion For Leave To Proceed *In Forma Pauperis* in the above-entitled case was mailed, first class postage prepaid, to the following: James M. Bullers, District Attorney, 26th Judicial District Court, Post Office Box 69, Benton, Louisiana 71006, counsel for respondent herein.

I further certify that all parties required to be served have been served.

Rebecca L. Hudsmith

Rebecca L. Hudsmith
Federal Public Defender for the
Middle and Western Districts of Louisiana
102 Versailles Blvd., Suite 816
Lafayette, Louisiana 70501
Telephone: (318) 262-6336
Facsimile: (318) 262-6605

Attorney for Petitioner

No. 96-7901

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

RICHARD F. TREST,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

CERTIFICATE OF SERVICE

I, Rebecca L. Hudsmith, a member of the Bar of this Court, hereby certify that on this 12th day of February, 1997, one copy of the corrected Petition for Writ of Certiorari and of the Motion For Leave To Proceed *In Forma Pauperis* in the above-entitled case was mailed, first class postage prepaid, to the following: James M. Bullers, District Attorney, 26th Judicial District Court, Post Office Box 69, Benton, Louisiana 71006, counsel for respondent herein.

I further certify that all parties required to be served have been served.

Rebecca L. Hudsmith

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Attorney for Petitioner

FEDERAL PUBLIC DEFENDER
WESTERN and MIDDLE DISTRICTS OF LOUISIANA
LAFAYETTE HEADQUARTERS
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Rebecca L. Hudsmith
Federal Public Defender

Wayne J. Blanchard
Joseph R. Streva, Jr.
Assistant Federal Public Defenders

(318) 262-6336
Fax (318) 262-6605

February 12, 1997

RECEIVED
FEB 18 1997
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: *Richard F. Trest v. John P. Whitley, Warden*

Dear Clerk:

As per your request in your letter dated January 31, 1997 regarding the above entitled petition for writ of certiorari, enclosed please find one (1) original and ten (10) copies of the MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and one (1) original and ten (10) copies of the PETITION FOR A WRIT OF CERTIORARI for re-filing of this matter.

The appendix index has been corrected to include the order denying the rehearing (Appendix C), the report and recommendation of the magistrate (Appendix D) and the objection to the report and recommendation (Appendix E), as required by Rule 14.1(i) and Rule 14.1(i)(iii).

A copy of the corrected above-entitled petition has been served on opposing counsels.

Sincerely,

Rebecca L. Hudsmith
Federal Public Defender for the
Western and Middle Districts of Louisiana

RLH:cma
Enclosures

FEDERAL PUBLIC DEFENDER
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(318) 262-6336
Fax (318) 262-6605

January 27, 1997

Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: *Richard F. Trest v. United States of America*
In the Supreme Court of the United States of America

Dear Clerk:

In regard to the above captioned matter, enclosed please find one (1) original and ten (10) copies of the MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and one (1) original and ten (10) copies of the PETITION FOR A WRIT OF CERTIORARI for the filing of this matter.

Sincerely,

Rebecca L. Hudsmith
Federal Public Defender for the
Western and Middle Districts of Louisiana

RLH:cma

Enclosures

RECEIVED
JAN 31 1997
OFFICE OF THE CLERK
SUPREME COURT, U.S.